No. 95-1803

In the Supreme Court of the United States

OCTOBER TERM, 1995

SPORTING CLUB ACQUISITIONS, LTD., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that a Federal Deposit Insurance Corporation (FDIC) asset sale may not be rescinded on petitioner's claim that the FDIC failed to maximize its recovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-15) is unpublished, but the decision is noted at 70 F.3d 1282 (Table). The order and judgment of the district court (Pet. App. 16-25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1995. A petition for rehearing was denied on January 31, 1996. Pet. App. 9. The petition for a writ of certiorari was filed on April 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) as receiver for Silverado Banking, Savings

and Loan Association, acquired title to the Cherry Creek Sporting Club (Club) through a public trustee's deed. Pet. App. 17. The Club was encumbered with a right of first refusal and purchase option (Right) held by Olympia & York Cherry Creek Co. (O&Y), and recorded in the records of Arapahoe County, Colorado. *Id.* at 18. The FDIC initially attempted to sell the Club at a sealed bid auction, but rejected as inadequate the high bid of $2.5 million. *Id.* at 17.

On December 14, 1993, the FDIC again offered the Club for sale, this time at public auction. It is undisputed that petitioner knew of the existence of the Right "well in advance" of this auction. Pet. App. 20. Moreover, prior to bidding, petitioner received a Property Information Packet, which included a copy of the Right, disclosed that the FDIC intended to afford the Right holder the opportunity to exercise the Right, and noted the Right as an exception to title. *Id.* at 18, 20.

At deposition, when asked whether he was ever informed that O&Y would *not* be allowed to assign or sell the Right, one of petitioner's partners responded: "No, we were never informed of anything like that." Pet. App. 21. The partner also testified that he "under[stood] that [petitioner] needed to exercise due diligence in . . . purchasing the property." *Ibid.*

At the public auction, petitioner made the high bid of $4.1 million, which the FDIC accepted, and a Purchase and Sale Agreement (P&S Agreement) was signed by petitioner and the FDIC. The P&S Agreement, which expressly recognized the Right and was conditioned upon the nonexercise of the Right by the "Right Holder," (Pet. App. 12) provided, in relevant part:

> The Seller and Purchaser acknowledge that the Property is subject to that certain First Right of Refusal * * * dated June 3, 1981 * * * and recorded on June 4, 1981, in Book 3425 at page 460 of the real property records of Arapahoe County, Colorado.
>
> Seller agrees that promptly upon execution of the Agreement * * *, Seller shall submit the Agreement * * * *to the party entitled to exercise the First Right of Refusal* (the "Right Holder") pursuant to the terms of the First Right of Refusal. If the Right Holder timely exercises its right to purchase the Property, the parties agree that: (i) such exercise shall not be deemed a default under the Agreement; (ii) the Agreement shall terminate; and (iii) Seller shall return the Initial Deposit and the Earnest Money to the Purchaser. If the Right Holder does not timely exercise its right to purchase the Property, then Seller and Purchaser agree to close the sale as set forth in the Agreement.

Id. at 20-21 (emphasis added).

After executing the P&S Agreement, the FDIC gave O&Y notice of petitioner's offer to purchase the Club. O&Y offered to sell the Right to petitioner for $250,000, but petitioner declined. Pet. App. 18. O&Y then sold the Right to another group, which exercised the Right and purchased the Club from the FDIC for petitioner's bid price of $4.1 million. The FDIC, in compliance with the P&S Agreement, immediately informed petitioner that the Right had been exercised, terminated the P&S Agreement, and refunded petitioner's earnest money. *Ibid.* Petitioner subsequently filed this action against the

FDIC, seeking specific performance and compensatory relief, and alleging fraud, breach of contract, and breach of fiduciary duty.

2. The district court dismissed petitioner's claims for specific performance and fraud,[1] then granted summary judgment to the FDIC on the remaining breach of contract and fiduciary duty claims. The court—considering both the P&S Agreement and the Right to which it expressly refers—ruled that the right of first refusal was an assignable property interest unlimited by any circumscribing contract provision. Pet. App. 18, 21. Nor did the FDIC breach its contract with petitioner by offering financing to the Right assignee, since the P&S Agreement provided expressly for such financing. *Id.* at 23. Lastly, the court found that, since no fiduciary relationship existed between petitioner and the FDIC, there could be no possible breach of fiduciary duty. *Id.* at 23-24.

3. The court of appeals affirmed. Pet. App. 10-15. The court found that the P&S Agreement could be nullified unqualifiedly by the "Right Holder," and refused petitioner's demand that "Right Holder" be interpreted as Right Holder "*at the time the operative purchase offer is communicated*," which would have precluded O&Y's assignment. *Id.* at 13 (emphasis added). No such limitation appeared in the

[1] The district court dismissed the specific performance claim on June 21, 1994, holding that 12 U.S.C. 1821(j) deprived the court of jurisdiction to grant specific performance against the FDIC. Pet. App. 26-29. Petitioner moved for clarification of that order, which the district court denied. *Id.* at 11. Petitioner then "confesse[d] to judgment" its fraudulent misrepresentation claim, seeking its dismissal, and the district court complied. *Id.* at 18.

"plain terms" of the P&S Agreement. *Ibid.* Further, the right of first refusal—a property right—is presumed freely assignable. Because no express prohibition on assignment appeared in the P&S Agreement, the court held that no possible breach could result from exercise of the Right by O&Y's assignee. *Ibid.*

The court also found no violation of the pertinent FIRREA[2] provision, 12 U.S.C. 1821(d)(13)(E), which requires the FDIC to maximize its return on asset sales.[3] First, the court found that petitioner failed to

[2] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

[3] Section 1821(d)(13)(E) provides:

> In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which—
>
> (i) maximizes the net present value return from the sale or disposition of such assets;
>
> (ii) minimizes the amount of any loss realized in the resolution of cases;
>
> (iii) ensures adequate competition and fair and consistent treatment of offerors;
>
> (iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and
>
> (v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

show any asserted illegality in the FDIC's interpretation of the P&S Agreement. Pet. App. 13-14. In fact, the FDIC had made clear its intention to honor the Right, a fact known to all potential bidders, who could use that information and bid directly for the Club or obtain it indirectly via assignment of the Right from O&Y. *Id.* at 14. The court then observed that, while the post-auction assignment "may have been financially unwary," in that bidding competition "could conceivably" have been undermined, "there is no evidence that in fact happened here." *Ibid.* In any event, an asserted FDIC error in judgment does not constitute an illegal act under Section 1821(d)(13)(E): "[i]ndeed, if it did, every contractual arrangement with FDIC would involve enormous uncertainty—any misjudgment, oversight, or miscalculation revealed in hindsight as potentially detrimental to FDIC could lead to charges of illegality and consequent reformation or rescission of the transaction." Pet. App. 14. Finally, the court rejected petitioner's claim that the FDIC was precluded from offering seller financing to O&Y's assignee, and affirmed the district court's holding that the FDIC owed petitioner no fiduciary duties. *Id.* at 14-15.

ARGUMENT

1. Petitioner's contention (Pet. 4-5) that the FDIC did not maximize its return by failing to nullify O&Y's Right is meritless. Had no Right existed, there is no reason to believe that the Club would have fetched a price higher than the $4.1 million the FDIC received. Nor does petitioner offer any theory pursuant to which the monies paid to O&Y for the Right could have been received by the FDIC in the sale of the Club. Were O&Y itself to have exercised its Right to purchase the Club, rather than assigned its Right, the FDIC would have been no better off than it is now. Thus, there is no basis for petitioner's assertion that the FDIC did not maximize its return.

2. The FDIC's treatment of petitioner was not unfair. Pet. 5-6. Petitioner asserts that the FDIC should have nullified the Right held by O&Y. As authority for this position, petitioner invokes Section 1821(d)(2)(G)(i)(II), which permits the FDIC to transfer any receivership asset or liability without any approval, assignment, or consent.[4] The Right, however, was not an FDIC asset, but rather a property interest held by O&Y that preexisted, and was not altered by, FDIC's receiving title to the Club. As such, the Right was freely assignable by O&Y. Pet. App. 13 (citing *Scott* v. *Fox Bros. Enters., Inc.*, 667 P.2d 773, 774 (Colo. Ct. App. 1983), and *Clark* v. *Shelton*, 584 P.2d 875 (Utah 1978)). Petitioner offers no explanation for how the use of Section 1821(d)(2)(G)(i)(II) might have precluded O&Y from disposing of its Right. Properly applied to the facts of this case, Section 1821(d)(2)(G)(i)(II) means that the FDIC need not obtain approval, assignment, or consent to transfer the Club as an asset, but it does not affect O&Y's ability to exercise its preexisting Right in the eventual sale of the Club.

Petitioner insists that bidders were misled because the FDIC did not disclose that a post-auction assignee could exercise the Right. Pet. 5. This allega-

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[4] Section 1821(d)(2)(G)(i)(II) provides that "[t]he Corporation may, as conservator or receiver[,] * * * transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer."

tion is a restatement of its argument, rejected by the court of appeals, that "Right Holder" must be "understood as tacitly modified by some such phrase as 'at the time the operative purchase offer is communicated,' thereby precluding O&Y's assignment of the first right after learning of [petitioner's] bid." Pet. App. 13. No such limitation appears in the P&S Agreement and, as a property interest, the Right is "fully alienable, transferable, and assignable." *Id.* at 21.

Petitioner asserts that other court decisions conflict with the court of appeals' ruling in this case. Pet. 6. However, both court of appeals decisions cited by petitioner are inapposite. See *In re Chung King, Inc.*, 753 F.2d 547, 553-554 (7th Cir. 1985) (holding that bankruptcy court had abused its discretion by setting aside sale of asset it had previously approved because no fundamental mistake or error was made by the bankruptcy court in originally approving the sale); *In re Transcontinental Energy Corp.*, 683 F.2d 326, 328-329 (9th Cir. 1982) (rejecting arguments to nullify sale approved by bankruptcy court). Petitioner cites no case in which a court has interpreted Section 1821(d)(13)(E) in a way that would lead to a result different from the one reached in this case.

3. Petitioner misconstrues Section 1821(d)(13)(E)(i) as "mandatory" by not taking into account Section 1821(d)(13)(E)(ii). As noted above, no evidence exists that the FDIC failed to maximize its return on the sale of the Club. Moreover, had the FDIC attempted what petitioner suggests, it would merely have exchanged one lawsuit for another: O&Y could have sued alleging that the FDIC had improperly nullified its Right, which had been duly recorded. An action by O&Y would have caused the FDIC to incur litigation

costs (thereby diminishing the return on the sale of the Club), a result in conflict with 12 U.S.C. 1821(d)(13)(E)(ii), which requires that the FDIC "minimize[] the amount of any loss realized in the resolution of cases." Petitioner's argument that Section 1821(d)(13)(E)(i) should be read as mandatory thus conflicts with this Court's rulings that courts should "give effect, if possible, to every clause and word of a statute." *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) (citations omitted). The FDIC's reasonable decision to accept $4.1 million for the Club under these circumstances comports fully with subsections 1821(d)(13)(E)(i) and (ii), which must be read together.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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